Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-744

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Counsel for *Amicus Curiae*

Date: December 29, 1992

23 pp

QUESTIONS PRESENTED

1. Whether, under this Court's decisions in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91 (1990), a court of appeals must exercise independent, *de novo* review of the Federal Trade Commission's finding that commercial speech is misleading and therefore unprotected by the First Amendment.

2. Whether the FTC may rely solely on its own reading of an advertisement in determining that an ad that is true on its face nonetheless conveys an implied misrepresentation to members of the public, or instead must base its determination on reliable extrinsic evidence of the public's understanding of the ad.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION . . . 5

I. COURTS SHOULD APPLY *DE NOVO* REVIEW TO FTC DECISIONS HOLDING THAT COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT 6

II. *DE NOVO* REVIEW IS WARRANTED IN LIGHT OF THE FTC'S RECORD OF FAILING TO HEED FIRST AMENDMENT RIGHTS 10

III. THE FTC ERRED IN FINDING AN FTC ACT VIOLATION IN THE FACE OF SURVEY EVIDENCE THAT CONSUMERS WERE NOT DECEIVED 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page**

Board of Trustees of SUNY v. Fox, 109 S. Ct. 3028 (1989) 13

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 6-9

Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York, 447 U.S. 557 (1980) 5, 11-13

Don's Porta Signs, Inc. v. City of Clearwater, 928 F.2d 1051 (11th Cir. 1987) 7

Friedman v. Rogers, 440 U.S. 1 (1979) 12

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) 7

In re Peel, 126 Ill.2d 397, 534 N.E.2d 980 (1989), *rev'd*, 110 S. Ct. 2281 (1990) 7

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) 7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6

Peel v. Attorney Registration and Disciplinary System of Illinois, 110 S. Ct. 2281 (1990) . . . . . *passim*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 5, 6, 18

Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio, 471 U.S. 626 (1985) . . . 15

Page

Statutes:

Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* 3, 10, 14, 17

§ 5, 15 U.S.C. § 45 3
§ 12, 15 U.S.C. § 52 3

Miscellaneous:

P. LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971) 8

R. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969) 8

G. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. B.J. 548 (1964) 8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-744

KRAFT, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial free speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, *cert. granted*, 112 S. Ct. 1290 (1992); *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 110 S. Ct. 2281 (1990);

Pacific Gas and Electric Co. v. Public Utility Com'n of California, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Com'n*, 447 U.S. 530 (1980).

WLF believes that permitting the free flow of commercial information is in the best interests of consumers because it facilitates informed consumer choices. To the extent that any such information is thought by some individuals to be misleading, those individuals ought to respond by providing additional information designed to correct the record, not by seeking to suppress the original information. WLF also believes that the success of our free enterprise system depends on the freest possible flow of commercial speech.

WLF is alarmed by the increasing tendency of federal and state regulatory officials to view their preferences regarding the optimal manner of presenting commercial information to the consuming public as the *only* acceptable manner of presentation. Such officials routinely label commercial information presented in other manners as "misleading" and thereby attempt to evade constitutional challenge to their edicts. Accordingly, WLF believes it is critical that the courts jealously guard their function as the final arbiter of First Amendment rights and not casually defer to agency findings that have the effect of limiting those rights.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, this case involves an attempt by Respondent Federal Trade Commission ("FTC") to suppress television and print advertisements prepared by Petitioner Kraft, Inc. ("Kraft") for its Kraft Singles American Pasteurized Process Cheese Food ("Singles"). The FTC contends that two sets of advertisements for Singles violate the Federal Trade Commission Act (the "Act"), 15 U.S.C. §§ 41 *et seq.* In particular, the FTC contends that the Singles advertisements constituted "unfair or deceptive" acts in violation of § 5 of the Act and "false advertisement" in violation of § 12 of the Act. 15 U.S.C. §§ 45, 52.

The advertisements in question highlight two facts: that Singles are made from milk and are a good source of calcium. Both sets of advertisements note that each 3/4 ounce slice of Kraft Singles is made from 5 ounces of milk. One of the two sets of advertisements goes on to note that "imitation" cheese slices (which compete with Kraft Singles) are made from little or no milk. Each of those claims is accurate.

The FTC contends, however, that each of the advertisements *implies* claims that are not true. The FTC contends that both sets of advertisements imply that each slice of Kraft Singles contains as much calcium as 5 ounces of milk when, in fact, it contains only 70% as much calcium (because roughly 30% of the calcium contained in the milk is lost during processing). The FTC further contends that the set of advertisements that mentions imitation cheese slices falsely implies that Kraft Singles contain more calcium than imitation cheese slices when, in fact, they contain roughly equivalent amounts of calcium.

Prior to disseminating the advertisements in question in 1985, Kraft hired two consumer survey organizations to conduct tests to determine what messages consumers took away from the advertisements. Those tests determined that consumers did not take away any false messages from the advertisements. Nonetheless, when a group known as the Center for Science in the Public Interest (CSPI)

complained to Kraft that the advertisements implied that each slice of Singles contains as much calcium as 5 ounces of milk, Kraft edited its advertisements to ensure that consumers would not draw that inference.[1]

Despite those edits, CSPI proceeded to complain to the FTC that some of the Kraft Singles advertisements were misleading, and the FTC began an investigation in January 1986. Kraft then hired a third research organization to determine whether the complaints had any merit. That organization's consumer survey, in order to make that determination, asked whether the advertisements made any comparisons to any other products. An average of only 3% of survey respondents inferred from the advertisements that Singles contain as much calcium as 5 ounces of milk (the "milk equivalency" claim), and an average of only 6.3% inferred that Singles contain as much calcium as imitation slices (the "imitation superiority" claim).

Nevertheless, the FTC issued a complaint on June 17, 1987, charging that both sets of advertisements in question were unlawful because they impliedly made the "milk equivalency" and the "imitation superiority" claims. Petition Appendix ("Pet. App.") 35a. An administrative law judge found against Kraft on those charges, and the FTC affirmed the ALJ in significant part, holding (among other things) that the Singles advertisements were actually misleading. Pet. App. 36a, 37a. The FTC issued a cease and desist order that forbade Kraft from making either the "milk equivalency" or the "imitation superiority" claims with respect to any cheese or imitation cheese product. Pet. App. 30a.

Kraft sought review of the cease and desist order in the United States Court of Appeals for the Seventh Circuit. Rejecting Kraft's request to conduct a *de novo* review of

---

[1] For example, Kraft added a subscript to some of the advertisements stating that "one 3/4 ounce slice has 70% of the calcium of five oz. of milk."

the FTC findings that the Kraft advertisements were misleading, the Seventh Circuit held that review of FTC findings should be limited to "the highly deferential, substantial evidence test." Pet. App. 7a-9a. The Seventh Circuit held that the FTC findings were supported by substantial evidence and thus enforced the cease and desist order. Pet. App. 10a-18a. The Seventh Circuit rejected Kraft's argument that the FTC may not rely *solely* on its own reading of advertisements in concluding that they are misleading when, as here, the company producing the advertisements has conducted consumer surveys that concluded that the advertisements are not misleading. *Id.*

REASONS FOR GRANTING THE PETITION

Ever since *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court has recognized that commercial speech -- that is, speech that "proposes a commercial transaction" -- is entitled to significant First Amendment protection. *Virginia State Board of Pharmacy* at 770. The "free flow" of such speech is deemed worthy of protection because it is "indispensable to the proper allocation of resources in a free enterprise system" as well as to "the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765.

In *Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York*, 447 U.S. 557 (1980), the Court laid down guidelines regarding the extent to which the government may regulate commercial speech without running afoul of First Amendment free speech guarantees. The government may absolutely ban commercial speech that promotes an illegal activity or is actually misleading. Speech that is not actually misleading but has the potential for being so may be regulated only upon a showing that: (1) the government has a "substantial" interest that is seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

Yet, in the 16 years since *Virginia State Board of Pharmacy* was handed down, the FTC has displayed little recognition that its regulation of commercial speech under the Federal Trade Commission Act is constricted by the First Amendment. The FTC appears to have been operating under the misguided notion that commercial speech it deems "unfair or deceptive" is by definition entitled to no First Amendment protection -- regardless how expansively the FTC chooses to define the term "unfair and deceptive." WLF urges the Court to hear this case in order to clarify the First Amendment limitations on the FTC's enforcement powers, both because that is an issue over which the courts of appeals are divided and because the FTC itself has shown little interest in conforming its conduct to First Amendment limitations.

I. COURTS SHOULD APPLY *DE NOVO* REVIEW TO FTC DECISIONS HOLDING THAT COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

As the Court recognized in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), in cases raising First Amendment issues "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)). Despite that admonition, the Seventh Circuit in reviewing the FTC's findings regarding the Kraft advertisements felt bound by the "highly deferential, substantial evidence test." Pet. App. 7a. Supreme Court review of that Seventh Circuit holding is warranted both because the courts of appeals are divided regarding the proper standard of review in such cases and because the Seventh Circuit's holding is contrary to *Bose* and opens the door to substantial FTC intrusion onto First Amendment rights.

Both the Seventh Circuit and the D.C. Circuit (in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (1985)) have declined to extend *Bose* (which involved appellate review of a finding that a libel-suit defendant's false statements in a magazine article were uttered with "actual malice") to the commercial speech context. However, two other courts of appeals (the Fifth and Eleventh Circuits) reached the opposite conclusion in determining that *Bose* requires *de novo* appellate review of findings that commercial speech is undeserving of First Amendment protection. *See Don's Porta Signs, Inc. v. City of Clearwater*, 928 F.2d 1051, 1053 n.9 (11th Cir. 1987)(*Bose* requires *de novo* review of district court determination that city government's justifications for regulating portable commercial signs met *Central Hudson* standards); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107-1108 (5th Cir. 1987)(same).

Moreover, the Court's recent decision in *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 110 S. Ct. 2281 (1990), makes clear that the Seventh Circuit erred in holding -- contrary to the Fifth and Eleventh Circuits -- that *Bose* does not extend into the realm of commercial speech. *Peel* involved an attempt by Illinois bar authorities to discipline an attorney for placing on his attorney letterhead a statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA).[2] Although acknowledging that the letterhead statement constituted commercial speech, the Court nevertheless held (citing *Bose* as authority) that prior findings that the letterhead was actually misleading were subject to *de novo* review. *See Peel*, 110 S. Ct. at 2291-2292 (plurality opinion)("Whether the inherent character of a statement places it beyond the protection of the First

---

[2] Illinois bar authorities argued that Mr. Peel's letterhead statement -- although literally true -- was "actually misleading" because, *inter alia*, the general public could reasonably believe that the NBTA was a state-sanctioned body and that Mr. Peel was entitled to "practice in the field of trial advocacy solely because he is certified by the NBTA." *In re Peel*, 126 Ill.2d 397, 534 N.E.2d 980, 984 (1989).

Amendment is a question of law over which Members of this Court should exercise *de novo* review. Cf. *Bose* . . ."); *id.* at 2293-2296 (Marshall, J., concurring in judgment).

The Seventh Circuit's attempts to distinguish *Peel* are unavailing. The Seventh Circuit argued that an appellate court's obligation to provide *de novo* review of First Amendment-related findings does not extend to findings of administrative agencies, which may have special expertise (lacking in a trial court) in making such findings. Pet. App. 8a-9a. That argument finds no support in either *Bose* or *Peel*, which were categorical in their statements that appellate courts should safeguard free-speech rights by providing *de novo* review of any finding that a statement is unprotected by the First Amendment. Indeed, *Peel* itself involved findings by an administrative body (Illinois's Attorney Registration and Disciplinary Commission), which presumably has developed considerable expertise in dealing with deceptive advertising by attorneys; yet this Court was unwilling to defer to findings that Mr. Peel's letterhead statement was "actually misleading" and thus unprotected by the First Amendment.

Moreover, the Seventh Circuit's opinion undercuts any serious claim by the FTC that its five commissioners have any special expertise in the field of deceptive advertising that would justify a special deference rule in First Amendment cases. The Seventh Circuit admitted:

> Indeed, proof of the FTC's inexperience abounds: false advertising cases make[] up a small part of the Commission's workload, *see* Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. B.J. 548, 571 (1964), most commissioners have little prior experience in advertising, *see* Paul H. LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971), and the average tenure of commissioners is very brief. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U.

Chi. L. Rev. 47, 86 (1969)(average tenure of four years).

Pet. App. 12a.

If anything, a finding that a statement is not protected by the First Amendment should be entitled to *greater* deference when made by a trial court than by an administrative agency. A trial court -- unlike some administrative agencies, such as the FTC, that sit as both prosecutor and fact-finder -- has no institutional bias on First Amendment issues and thus can lay a much stronger claim to being a neutral fact-finder. Moreover, a far more plausible case for a deferential standard of review can be made in cases, such as *Bose*, in which the question of whether the statement at issue is constitutionally protected turns on the credibility of a trial witness,[3] than in cases where, as here, the original fact-finder's decision was not based on witness-credibility determinations.

Finally, the Seventh Circuit's deferential standard of review would create radical disparities in First Amendment protections from state to state. Residents of states whose administrative agencies took an expansive view of what constitutes "misleading" speech would enjoy more limited First Amendment rights than residents of other states. Indeed, *Peel* cited the possible creation of disparate state-to-state First Amendment standards as one reason for declining to defer to Illinois's finding that Mr. Peel's letterhead statement was "misleading" and therefore

---

[3] In *Bose*, the plaintiff alleged that the defendant's writer had acted with "actual malice" (i.e., knowledge of falsity or reckless disregard for the truth) in writing false statements about the plaintiff's product. Thus, the issue of liability turned on the writer's state of mind. The Court held that the appellate court properly afforded *de novo* review to the "actual malice" issue, despite the fact that only the trial judge had had an opportunity to view the writer's six days of testimony and thereby to judge his state of mind based on his demeanor at trial. *Bose*, 466 U.S. at 511; *id.* at 519-520 (Rehnquist, J., dissenting).

constitutionally unprotected. *Peel*, 110 S. Ct. at 2291 n.16.

The Seventh Circuit's second argument for distinguishing *Peel* is similarly unavailing. The court said that the issue in *Peel* was "whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading speech, passed constitutional muster," while this case involves "an administrative order applicable only to a single entity." Pet. App. 9a & n.3. The Seventh Circuit's purported distinction is factual inaccurate; both cases involved administrative action taken against a party based on alleged violation of a generally applicable rule (here, the Federal Trade Commission Act's prohibition against "unfair or deceptive" acts and, in *Peel*, an attorney disciplinary rule that prohibited lawyers from holding themselves out as "certified" or as "specialists").

Moreover, even if the Seventh Circuit's purported distinction were accurate, it would be a distinction without a difference. Indeed, the Seventh Circuit never even attempted to explain why the purported distinction should result in differing levels of appellate review. In sum, *Peel* is directly on point, and conflicts with the Seventh Circuit's conclusion that *de novo* review is inappropriate in this case. The Court should grant the writ of certiorari in order to address that conflict, as well as the conflict between the Seventh Circuit's decision and the decisions of the Fifth and Eleventh Circuits.

II. *DE NOVO* REVIEW IS WARRANTED IN LIGHT OF THE FTC'S RECORD OF FAILING TO HEED FIRST AMENDMENT RIGHTS

WLF is particularly concerned that FTC deceptive advertising findings be subjected to *de novo* review because the FTC's conduct over the past decade indicates that it believes itself unencumbered by First Amendment restrictions on commercial speech regulation. Statements made by the FTC in its decision in this case indicate a

lack of understanding of First Amendment case law. That misunderstanding must inevitably infect FTC findings that certain advertisements are sufficiently "misleading" as to be deprived of all First Amendment protection. Accordingly, arguments that might otherwise support judicial deference to FTC First Amendment-related findings must give way here in light of the FTC's demonstrated inability to deal adequately with First Amendment issues. Granting Kraft's certiorari petition would allow the Court not only to establish the proper appellate standard of review in FTC cases but also to correct the FTC's misapplication of First Amendment case law.

The FTC apparently misunderstands *Central Hudson*'s holding that commercial speech that is "actually" or "inherently" misleading is subject to absolute prohibition in all cases. The FTC found that Kraft's advertisements were "deceptive," equated a finding of deceptiveness with a finding of "actually misleading" for *Central Hudson* purposes, and thus concluded that *Central Hudson* permitted the FTC to end its constitutional analysis at that point. Pet. App. 69a-70a. The flaw in the FTC's analysis is that what the FTC historically has meant by "deceptive" advertising and what this Court's commercial speech decisions have meant by "actually" or "inherently" misleading commercial speech are entirely different concepts.

The FTC historically has defined a "deceptive" advertisement as one that "reasonably can be interpreted in a misleading way." Pet. App. 39a n.8. The FTC includes advertisements within its definition of "deceptive" even when non-misleading interpretations are at least as possible as a misleading one. *Id.* Indeed, an advertisement is "deceptive" even if only a "significant minority" of reasonable consumers is misled thereby. Pet. App. 41a. Moreover, the FTC does not require evidence that *anyone* was actually misled by an advertisement before the advertisement can be branded "deceptive." Pet. App. 57a.

As so defined, the FTC's definition of a "deceptive" advertisement is significantly broader than this Court's concept of "actually or inherently misleading" commercial speech that can be prohibited in all circumstances. The Court made clear in *Peel* that commercial speech that contains no express, demonstrably false terms can never be labeled "actually" or "inherently" misleading in the absence of evidence that someone was actually misled by the speech. *Peel*, 110 S. Ct. at 2290 (plurality opinion); *id.* at 2293 (Marshall, J., concurring in judgment).[4] The Court has, of course, permitted regulation of commercial speech that is "potentially misleading"[5] even though not "actually" or "inherently" misleading; but in those circumstances, no regulation is permitted unless the regulator can meet each of the other three requirements laid down in *Central Hudson*: the government has a "substantial" interest that it seeks to achieve; the regulation directly advances the asserted interest; and the regulation is no more extensive than necessary to serve that interest.

The FTC has avoided ever having to address the last three *Central Hudson* requirements by decreeing that all advertising that meets its definition of "deceptive" also meets this Court's definition of "actually" or "inherently"

---

[4] The Court has never defined precisely what percentage of reasonable consumers must be misled by an advertisement before it will be found to be "actually" or "inherently" misleading. There is some indication in *Central Hudson* that an advertisement is "actually" or "inherently" misleading if a majority of consumers are misled thereby. *See Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it") (citing *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979)).

[5] Commercial speech is said to be "potentially misleading" when -- although it is not "inherently misleading" because it does not convey a false message to most listeners -- "a person reasonably could draw" an incorrect inference from the speech. *Peel*, 110 S. Ct. at 2295 (Marshall, J., concurring in judgment).

misleading (and thus is subject to summary prohibition).[6] Yet, even a cursory examination of the FTC's definition of "deceptive" speech reveals that much of the speech so classified would be termed "potential misleading" by the Court. For example, as noted above, the FTC labels "deceptive" any speech that reasonably could be interpreted in a misleading way (Pet. App. 39a n.8), but the Court terms such speech only "potentially misleading" if it is generally interpreted in a non-misleading way. *Peel*, 110 S. Ct. at 2295 (Marshall, J., concurring in judgment). Accordingly, the FTC's position that it is empowered to prohibit all speech that meets its definition of "deceptive" is a clear violation of *Central Hudson*.[7]

---

[6] After finding that the only speech at issue in this case was "either expressly or impliedly false or deceptive" and thus unprotected under the First Amendment, the FTC added: "We find that the record in this case establishes a reasonable fit between the violations found and the scope of the order's prohibitions. *See Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3033-35 (1989)." Pet. App. 70a. Accordingly, the FTC may attempt to argue that -- although not actually required to do so (because Kraft's advertisements were inherently misleading) -- it nonetheless justified its conduct under *Central Hudson* standards applicable to commercial speech that is merely "potentially misleading." Any such claim would be untenable. First, the quoted sentence addressed only one of the three *Central Hudson* factors. Second, the sentence makes clear that the FTC was addressing that factor based on the premise that Kraft's advertisements were "actually misleading." Accordingly, the FTC cannot be said to have conducted an alternative constitutional analysis based on the premise that Kraft's conduct was merely "potentially misleading" rather than "actually misleading."

[7] The FTC is not alone in attempting to label all commercial speech of which it disapproves "inherently misleading" and thereby to avoid application of the *Central Hudson* test. Indeed, that is precisely what happened in *Peel*. Illinois branded Mr. Peel's letterhead statement as "actually misleading" and claimed that because of that classification, it was under no obligation to meet the *Central Hudson* requirements before banning Mr. Peel's speech. The Court rejected that attempt to bypass *Central Hudson*. It said that commercial speech could not be labeled as "actually misleading" in the absence of evidence that anyone was actually misled by the speech. *Peel*, 110 S. Ct. at 2290. WLF asks the Court to grant review in this case to make

(continued...)

In sum, while the FTC may have considerable experience in dealing with deceptive advertising cases, it clearly lacks an informed understanding of commercial speech doctrine sufficient to justify judicial deference to any FTC findings regarding First Amendment-related issues. The Court should grant the certiorari petition in this case to correct the Seventh Circuit's ill-considered decision to the contrary.

III. THE FTC ERRED IN FINDING AN FTC ACT VIOLATION IN THE FACE OF SURVEY EVIDENCE THAT CONSUMERS WERE NOT DECEIVED

Although it conducted no surveys to determine what messages consumers drew from Kraft's advertisements, the FTC determined that the advertisements were deceptive based "on its own impression of the advertisements." Pet. App. 6. While WLF would concede that there are cases in which the deceptive nature of an advertisement is so apparent from its face that the FTC should not be required to produce extrinsic evidence to support a finding of an FTC Act violation, that will never be the case when, as here, the only available consumer-based information indicates that consumers are *not* misled by the advertisements in question. WLF is fearful that permitting the FTC to find violations of the Act in such cases will significantly chill commercial speech and thereby deprive consumers of valuable information. Accordingly, WLF asks the Court to grant certiorari in this case in order to eliminate what it views as a serious threat to First Amendment rights.

---

[7] (...continued)
clear to administrative agencies that unsubstantiated findings that commercial speech is "inherently misleading" may not be used as a device to avoid having to make the difficult showings normally required before non-misleading commercial speech may be regulated.

The Seventh Circuit cited *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626 (1985), in support of the FTC's decision to sanction Kraft even in the absence of consumer survey evidence suggesting that anyone was deceived by Kraft's advertisements. The Seventh Circuit read too much into *Zauderer*. The Court held that "[w]hen the possibility of deception is as self-evident" as it was with the attorney advertising in that case,[8] the First Amendment does not require a state regulator to conduct consumer surveys in order to establish the advertisement's tendency to deceive. *Zauderer*, 471 U.S. at 652-653. *Zauderer* held no more than that where the misleading nature of the speech at issue is beyond reasonable dispute, evidence that consumers were actually deceived need not be produced before the speakers may be sanctioned. It left open the question of how courts go about determining that the speaker is being unreasonable in protesting that his speech was not misleading.

WLF cannot supply the Court with an easily-applied test that will distinguish those (relatively rare) forms of commercial speech that, while containing no demonstrably false assertions, make implied claims that are self-evidently misleading, from those forms of commercial speech that make no such claims. Nonetheless, *Peel* makes clear that the general rule is that commercial speech containing no express, demonstrably false terms should not be deemed inherently misleading in the absence of evidence that some consumers were actually misled. *Peel*, 110 S. Ct. at

---

[8] In *Zauderer*, an attorney had run advertisements that disclosed his availability for contingent fee lawsuits and stated that "if there is no recovery, no legal fees are owed by our clients," thereby leaving the (false) impression that the client would owe nothing if his lawsuit were unsuccessful. *Zauderer*, 471 U.S. at 652. The Court noted that most nonlawyers use the terms "legal fees" and "costs" interchangeably and would not appreciate that while unsuccessful plaintiffs rarely are liable for the former, they are almost always liable for the latter. *Id.*

2290.[9] The "self-evidently misleading" exception to that general rule would quickly swallow the general rule if it were found to apply even in situations, as here, where the only existing consumer surveys conclude that few, if any, consumers were misled. Accordingly, while there undoubtedly are a few extreme cases in which the self-evidently misleading nature of the claims implied by an advertisement should permit the suppression of commercial speech even in the absence of extrinsic evidence that some consumers were misled, this case -- in which the only available consumer survey information indicates that few, if any, consumers were misled -- clearly is not one such case.

The Seventh Circuit's "solution" to the problem of how to discern when an advertisement contains implied claims that are self-evidently misleading is no solution at all. The Seventh Circuit would affirm the FTC's finding of deceptive advertising, even in the absence of extrinsic evidence of deception, whenever the reviewing court agrees with the FTC that the implied claims are "reasonably clear" from the face of the advertisement. Pet. App. 16a. But all the Seventh Circuit's standard does is to add the views of three judges to those of several FTC commissioners; three judges are in no better position than the commissioners to second-guess consumer surveys that indicate that consumers are not deceived.[10]

---

[9] Indeed, even the Seventh Circuit admitted, "[T]he extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception." Pet. App. 16a.

[10] For the record, it is the view of WLF's attorneys -- who have no direct interest in this lawsuit -- that the Kraft advertisements convey neither the "milk equivalency" nor the "imitation superiority" claims. We find absurd the FTC's suggestion that consumers buy Kraft Singles because they have been misled into believing that one slice of Kraft Singles contains the same amount of calcium as 5 ounces of milk, when (as the FTC found -- Pet. App. 58a n.22) 98% of consumers have no idea how much calcium is in 5 ounces of milk. Consumers

(continued...)

There is no doubt that commercial speech will be chilled if the FTC's cease and desist order is allowed to stand. Businesses that are hit with such orders face significant negative consequences -- both due to the negative publicity attendant to being labeled as the purveyor of misleading advertisements, and because a business that has been found once to be in violation of the FTC Act faces severe monetary sanctions if later cited for a second violation. Accordingly, businesses will react to this decision by decreasing the number of advertisements that make objectively verifiable claims (whether express or implied) about a product. Instead, they will concentrate increasingly on "feel good" advertising that provides little useful information to consumers but that is effective in increasing sales (through increased name recognition) and that is generally safe from FTC challenge. As Judge Manion observed in his concurring opinion below, businesses will be reluctant to engage in comparative advertising if the Seventh Circuit's decision is allowed to stand, because now even a pre-dissemination survey of consumers showing that consumers are not deceived by a particular ad is no assurance that the FTC will not subsequently make a contrary finding. Pet. App. 27a.[11]

---

[10] (...continued)
who buy Singles after seeing the disputed ads will do so because they have been led to believe (correctly) that Singles are a good source of calcium, not because they believe that each slice will give them a specified percentage of their daily calcium needs.

Of course, the views of WLF's attorneys regarding whether Kraft's ads convey implied claims that will mislead a sizeable number of consumers are not particularly relevant, because WLF has not conducted any consumer surveys on that issue. But then again, the views of five commissioners and three appellate judges who also have conducted no consumer surveys are equally irrelevant in the face of survey results showing that consumers were not deceived.

[11] WLF finds particularly disturbing the FTC's decision to term Kraft a "deliberate" FTC Act violator -- and to cite that deliberateness as justification for its broad cease and desist order -- based on Kraft's (continued...)

Businesses may be able to minimize their injury flowing from this decision, since they are likely to find alternative ways to market their products. It is consumers -- who will be denied valuable information regarding products in the marketplace -- who will suffer most. The First Amendment protects not only the speaker but also those who wish to receive information. *Virginia State Board of Pharmacy*, 425 U.S. at 756. Thus, while the Court should grant the petition for a writ of certiorari in order to determine whether the chilling effects on commercial speech caused by the FTC's decision in this case violates Kraft's First Amendment rights, it is the detrimental effect that this case could have on the First Amendment rights of consumers that makes this case particularly important.

CONCLUSION

For the foregoing reasons, WLF respectfully submits that the petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

December 29, 1992

---

[11] (...continued)
decision to defend its right to speak freely in the face of criticism from CSPI and the FTC staff. Pet. App. 67a-68a. There is no surer way to chill commercial speech in this country than to target for severest sanction those companies that fail to kowtow to the informal demands of government bureaucrats or to the complaints of self-appointed guardians of the public interest.